92-892

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CONSOLIDATION COAL COMPANY,
Petitioner,

vs.

SHARON SNIDER,
Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in ruling that discretionary judicial principles of collateral estoppel govern the relationship between the jury's verdict on Respondent Snider's legal claims and her jointly tried equitable Title VII cause of action, rather than the Seventh Amendment to the United States Constitution when the jury's verdicts, if followed, would have been dispositive of Snider's equitable Title VII claim?

2. Whether the Court of Appeals erred in permitting the trial court to reverse the jury's credibility resolutions and reach a decision on Snider's equitable Title VII claim that is conceded to be inconsistent with the jury's verdicts on her state tort legal claims, based on the testimony of an expert witness heard only by the Court and properly excluded from the jury's consideration, without first setting aside the jury's findings?

LIST OF PARTIES

Sharon Snider was the Plaintiff below and is the Respondent before this Court.

Richard C. Delloma was a Defendant below but is not a party to the proceeding before this Court.

Consolidation Coal Company was a Defendant below and is the Petitioner before this Court. Petitioner is owned fifty-one (51) percent by CONSOL, Inc. and forty-nine (49) percent by Consol Energy Inc. Consol Energy Inc. is owned fifty (50) percent by Du Pont Energy Company, forty (40) percent by Rheinbraun AG and ten (10) percent by Rheinbraun US GmbH. Du Pont Energy Company is owned one hundred (100) percent by E. I. duPont de Nemours and Company. Rheinbraun AG is owned one hundred (100) percent by RWE AG. Rheinbraun US GmbH is owned thirty (30) percent by Rheinbraun AG and seventy (70) percent by RWE AG.

The following is a listing of non-wholly owned subsidiaries of Petitioner:

Conrhein Coal Company Partnership
Emery Mine Joint Venture
Bailey Mine Joint Venture
Braunsol Resources Partnership Company
Pocahontas Gas Partnership
Amos Run Mine Joint Venture
Ameropa Coal Trading And Shipping, Inc.
Neptune Bulk Terminals Ltd.
Cardinal River Coals, Ltd.
Cardinal River Mine Joint Venture
Enlow Fork Mine Joint Venture

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Consolidation Coal Company, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit in this proceeding.

OPINIONS BELOW

The opinion of the Seventh Circuit (App. A), is reported at 973 F.2d 555 (7th Cir. 1992).

The opinions of the United States District Court (App. C, D), are not published.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit, along with that Court's judgment, were entered August 26, 1992. (App. A). The petition for rehearing and suggestion for a rehearing en banc, were denied by the Court of Appeals on September 28, 1992. (App. B).

The jurisdiction of this Court is conferred by 28 U.S.C. 1254(1) and 2101(c).

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this proceeding is the Seventh Amendment to the United States Constitution.

SEVENTH AMENDMENT

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

This litigation was initiated in July, 1986 when Respondent Sharon Snider filed a complaint in the United States District Court for the Southern District of Illinois against Petitioner Consolidation Coal Company and one of its mine superintendents, Richard C. Delloma, arising out of alleged conduct by Delloma towards Ms. Snider. Snider's lawsuit alleged sex discrimination under Title VII of the Civil Rights Act, 42 U.S.C. 2000e *et seq.*, and a number of state-based tort claims raising common issues of fact. (App. A, A-3).

The state tort claims brought by Snider included assault, battery and intentional infliction of emotional distress, all of which were based on her claim that Delloma assaulted and

touched her in an offensive manner. (App. A, A-3). Snider's equitable Title VII cause of action is based on the identical factual allegations that she made in support of her legal claims.

Both the state tort claims and the equitable Title VII claim were tried jointly in May, 1989. (App. A, A-3). In its opinion, the Seventh Circuit properly characterized the outcome of this litigation as dependant upon the credibility of the two (2) primary witnesses—Delloma and Snider. (App. A, A-3,7,8). The Court stated that "Snider set forth her allegations, and Delloma denied them." (App. A, A-3). The Court of Appeals further stated that: "[t]he jury's verdict turned on one single issue: whether the jurors believed Snider's version of the events, or whether they believed Delloma's". (App. A, A-7,8).

The jury credited Delloma and returned unanimous verdicts against Snider and in favor of Delloma and Petitioner Consolidation Coal Company on each of the state tort claims. (App. A, A-5). Respondent Snider filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, which was denied by the District Court on June 27, 1990. (App. A, A-5). Snider appealed to the Seventh Circuit, but subsequently abandoned her appeal. (App. A, A-4n.5). Judgment was issued on all of the state tort claims on January 8, 1991 (App. E).

During the May, 1989 trial, the District Court heard testimony from sexual harassment expert Freada Klein as part of Snider's Title VII claim. (App. A, A-4). The District Court excluded Klein from testifying before the jury, a ruling that the Court of Appeals found to be proper. (App. A, A-7). Ms. Klein provided generalized testimony on the issue of sexual harassment. She had no personal knowledge regarding the consensual nature of the relationship between Snider and Delloma, nor did she offer an opinion as to the nature of that relationship. (App. A, A-4).

1. The District Court Decision On The Title VII Claim.

On June 27, 1990, the District Court ruled that Petitioner Consolidation Coal Company was liable for sex discrimination under Title VII of the Civil Rights Act based on the conduct of its mine superintendent, Richard C. Delloma (App. C, A-24, 25).[1] The District Court's Memorandum and Order on the Title VII claim relied upon Ms. Klein's testimony to revisit and re-decide the issue of credibility between Snider and Delloma that had been previously decided by the jury. (App. C). Of the thirty (30) findings of fact contained in the District Court's Order, six (6) were based entirely on Klein's testimony. (App. C, A-5,19,20 (findings of fact 25-30)). The remaining findings of substance assumed the credibility of Ms. Snider (App. C). The District Court's Conclusions of Law, upon which Title VII liability was imposed upon Petitioner, was also based upon the testimony of Ms. Klein and the credibility of Snider's testimony. (App. C).

The parties to this litigation are in agreement that the jury verdict cannot be reconciled with the District Court's Title VII ruling. (App. A, A-7). Thus, this is not a case where any differences in the proof of the state claims and the Title VII claim can be reconciled to harmonize what appears to be inconsistent judgments. The rulings are, in fact, irreconcilable. Had the District Court followed the jury's findings, their verdict would have been dispositive of Snider's Title VII claim.

2. The Decision of the Seventh Circuit Court of Appeals.

On August 26, 1992, the Seventh Circuit Court of Appeals affirmed the District Court's judgment in favor of Respondent Snider on her Title VII claim. Snider conceded, and the Seventh Circuit accepted, the proposition: "that the issues in the legal and

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[1] The trial court further ruled that Delloma was sued solely in his official capacity and, therefore, was not liable to Respondent Snider under Title VII. (App. C, A-25, 26). That ruling was not appealed.

equitable claims were common, and that the jury's verdict is inconsistent with the judge's decision." (App. A, A-7). Nevertheless, the Court concluded that the District Court was not bound by the jury's verdict in ruling on Snider's Title VII claim, and that it could properly reverse the credibility resolutions made by the jury and reach the opposite result based on the additional testimony of Klein in the equitable proceeding. (App. A, A-8)

Petitioner's argument that the Seventh Amendment required the District Court to either adhere to the jury's verdict in ruling on the equitable Title VII claim, or to invalidate the jury's verdict by granting Snider's post trial motion to set the verdict aside, was rejected by the Seventh Circuit. The Court instead ruled that inconsistent findings are proper and that the binding effect, if any, that a jury's verdict has on the trial court in deciding a related equitable cause of action, is determined from application of discretionary principles of collateral estoppel and not the Seventh Amendment. (App. A, A-7).

The Court further concluded that collateral estoppel was inapplicable to Snider's Title VII claim because of the exclusion of Freada Klein's testimony from the jury. The Court reasoned that Klein's exclusion from the jury, even though proper, nevertheless prevented Snider from having a "full and fair opportunity" to litigate her state tort claims. (App. A, A-7-9). Thus, the District Court was not bound by the jury's findings.

Petitioner's motion for rehearing, with a suggestion of a rehearing en banc, was denied on September 28, 1992. (App. B). This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

The Writ sought by Petitioner should be granted because the Seventh Circuit opinion in this case presents a significant departure from the decisions of this Court and various Courts of Appeal regarding the role of the Seventh Amendment in a jointly tried lawsuit raising both legal and equitable claims. Specifically, the Seventh Circuit's opinion conflicts with this Court's decision in *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545. 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990). The opinion also significantly undermines Supreme Court precedent requiring the trial of all legal claims prior to equitable claims in a jointly tried lawsuit, by rendering the binding effect of the jury's findings subject to the discretionary power of the trial court under the collateral estoppel doctrine.

This Writ should also be granted to decide the important and unsettled question among the Circuits of whether the rule that binds a trial court to a jury's findings is based upon the Seventh Amendment or collateral estoppel. Although no other Circuit has permitted the trial court to ignore a jury's findings without first invalidating their verdict, several Circuits have labelled that rule as "collateral estoppel" rather than properly denominating it as a Seventh Amendment requirement. Absent a final determination of this issue from this Court, other Circuits who have used the collateral estoppel terminology could follow the Seventh Circuit's opinion in this case and exercise their discretionary power under that doctrine to eviscerate a jury's findings without specifically ruling on the validity of those findings.

I.

THE SEVENTH CIRCUIT'S DECISION TO APPLY THE DISCRETIONARY DOCTRINE OF COLLATERAL ESTOPPEL IN THE CONTEXT OF A LAWSUIT WITH JOINTLY TRIED LEGAL AND EQUITABLE CLAIMS IS INCONSISTENT WITH THIS COURT'S PRIOR DECISIONS AS WELL AS THE DECISIONS OF SEVERAL COURTS OF APPEAL.

A. THE SEVENTH CIRCUIT OPINION IS INCONSISTENT WITH THIS COURT'S DECISION IN *LYTLE V. HOUSEHOLD MANUFACTURING, INC.*, 494 U.S. 545, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990).

The Seventh Circuit's use of the discretionary doctrine of collateral estoppel to determine that the jury's verdict on Snider's legal claims was not binding on the District Court when ruling on her equitable Title VII claim is in direct conflict with this Court's decision in *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990). The Seventh Circuit did not cite the *Lytle* decision in its opinion. The Seventh Circuit was clear, however, in ruling that collateral estoppel is the governing principle of law for this, and other, jointly tried cases: "[T]he rule that binds the judge to the jury's findings is grounded in collateral estoppel and not the Seventh Amendment." (App. A, 6-7).

The *Lytle* Court specifically rejected the application of collateral estoppel to jointly tried legal and equitable claims: "Application of collateral estoppel is unnecessary here to prevent multiple lawsuits because this case involves one suit in which the plaintiff properly joined his legal and equitable claims." *Lytle*, 494 U.S. at 553, 110 S.Ct. at 1337, 108 L.Ed.2d 516. In *Lytle*, as here, the legal and equitable claims were joined in a single lawsuit. The trial court improperly dismissed the legal claims,

and ruled against the plaintiff on the equitable claims. In this posture, the Court concluded that the Seventh Amendment was controlling:

> Moreover, our refusal to apply collateral estoppel does not dissipate judicial resources in "needless litigation" over previously-resolved issues, *Parklane Hosiery Co. v. Shore*, 439 U.S. at 326, 99 S.Ct. at 649 (1979). Although our holding requires a new trial in this case, we view such litigation as essential to vindicating Lytle's Seventh Amendment rights.

Lytle, 494 U.S. at 553, 110 S.Ct. at 1337, 108 L.Ed.2d at 516.

The respective roles set by this Court for the doctrine of collateral estoppel and the Seventh Amendment in litigation raising related legal and equitable claims is clear from a comparison of the decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), which was cited and relied upon by the Seventh Circuit, with this Court's decision in *Lytle, supra*. In *Parklane*, the Court permitted the application of collateral estoppel to foreclose litigation before a jury. In that case, however, there had been an adverse determination of the same claim in a prior equitable proceeding *where the legal claim could not have been made. Parklane Hosiery Co. v. Shore*, 439 U.S. at 332, 99 S.Ct. at 652, 58 L.Ed.2d at 563. This Court ruled, over a strong dissent from Chief Justice Rehnquist that Seventh Amendment rights were being eroded, that collateral estoppel was the applicable principle of law.

The *Lytle* Court did not overrule the *Parklane* decision, but did rule that the Seventh Amendment precluded an extension of its collateral estoppel rationale to jointly tried claims. In *Lytle*, the Seventh Amendment rights of the litigant required a new trial of his legal claims and the collateral estoppel notions of judicial economy and efficiency were properly disregarded. Unlike *Parklane*, the litigant's Seventh Amendment right attached prior to a decision on the equitable claim and, in that circumstance, this

Court required that his constitutional right be given its full measure.

The opinion by the Seventh Circuit in this litigation does precisely what was rejected by the *Lytle* Court. That is, it applied the discretionary doctrine of collateral estoppel to jointly tried legal and equitable claims. As a consequence, Petitioner lost a Title VII decision that could not have been lost if the trial court had followed the jury's verdict on the state tort claims. This result is inconsistent with the decision in *Lytle* and violative of Petitioner's Seventh Amendment rights.

B. THE SEVENTH CIRCUIT OPINION IS INCONSISTENT WITH THE RATIONALE OF OTHER SUPREME COURT DECISIONS ON JOINTLY TRIED CLAIMS.

The Seventh Circuit's decision will also undermine this Court's prior Seventh Amendment decisions that require the resolution of legal claims prior to related equitable causes of action. *See, e.g., Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) and *Curtis v. Loether*, 415 U.S. 189, 94 S.Ct. 1005, 39 L.Ed.2d 260 (1974). The requirement that legal claims be resolved before equitable claims in a single lawsuit means very little if the Court, in deciding the equitable claim, is not bound by the jury's findings of fact.

Indeed, if the trial court is free to re-examine jury findings without first invalidating those findings, the order in which the claims are tried or resolved is of no moment whatsoever. In fact, the trial court in actual practice typically does not issue its decision in an equitable claim until long after the jury has rendered its verdict on legal claims. [2] Thus, if adherence to the

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[2] The jury verdict in this case was rendered in May, 1989, while the trial court's rulings on the Title VII claim were issued on June 27, 1990 and January 8, 1991.

jury's findings is discretionary, it would likely promote judicial economy to hear any evidence peculiar to the equitable claims before the jury is ever impaneled. It is respectfully submitted that this type of far reaching departure from the Seventh Amendment was not envisioned by the Framers to the Constitution or by this Court's precedent.

C. THE SEVENTH CIRCUIT OPINION IS IN CONFLICT WITH ITS OWN PRIOR DECISIONS AND THE DECISIONS OF OTHER CIRCUIT COURTS.

The Seventh Circuit opinion in this litigation is also in conflict with its own prior decisions and those of other Circuit Courts of Appeal. The other Circuits, including the Seventh Circuit prior to this case, have recognized that a judge is bound by the prior findings of fact by the jury.

In *Volk v. Coler*, 845 F.2d 1422 (1988), the Seventh Circuit expressly required the trial court to either follow the jury's findings or set them aside as infirm:

> The district court here improperly removed the resolution of some of Volk's legal claims from the jury's responsibility by ordering directed verdicts. . . . [B]ecause the district court would have been bound by the jury's verdict on related issues, *unless it set the jury verdict aside*, and our decision reverses the directed verdicts on her [Sec.] 1983 and [Sec.] 1985(3) claims, the judgment entered on all of the plaintiff's Title VII claims must also be reversed.

Volk v. Coler, supra at 1438 (emphasis supplied).

Likewise, the opinion in this case conflicts with the Seventh Circuit decision in *Hussein v. Oshkosh Motor Truck Co.*, 816 F.2d 348 (1987). In *Hussein*, both legal and equitable claims were joined in a single lawsuit as in the instant matter. The Court properly rejected collateral estoppel principles to that case

because the rationale for application of collateral estoppel is not present when both legal and equitable claims are joined together:

> We believe that the present case presents a substantially different situation than that before the Supreme Court in *Parklane*. Here, there is no earlier valid judgment. Mr. Hussein brought a single action in the district court. The facts underlying Mr. Hussein's section 1981 claim also form the basis of his cause of action under Title VII.
>
> . . .
>
> Under these circumstances, the policy concerns which govern the application of the doctrine of collateral estoppel certainly do not require its application here.

Hussein v. Oshkosh Motor Co., supra at 356. No reason was given by the Seventh Circuit for not following its own prior decisions.

The decision in this case is also in conflict with the other Circuit Courts of Appeals. The Ninth Circuit, in *Miller v. Fairchild*, 885 F.2d 498 (1989), ruled that when legal and equitable claims are brought in a single lawsuit "the Seventh Amendment requires the trial judge to follow the jury's implicit or explicit factual determinations in deciding the equitable claim." *Miller v. Fairchild, supra* at 507 (citations omitted).

Similarly, the Third Circuit, in *Roebuck v. Drexel University*, 852 F.2d 715 (1988), ruled that: "A trial judge should not be allowed to ignore a considered decision of a jury merely because the judge views the issues differently, for otherwise the seventh amendment right to a jury trial would be significantly attenuated." *Roebuck v. Drexel University, supra* at 737 (footnote omitted). Likewise, the Tenth Circuit, in *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439 (1988), ruled that a trial court does not have discretion to modify a monetary award in an equitable claim after the jury had set the amount of compensation

in the legal cause of action: "Such action by the court was in violation of the Seventh Amendment: either the court should have granted the motion for a new trial if it concluded that the damage award was, in fact, too low, or it should have treated the jury's award of backpay under [sec.] 1981 as determinative of both claims." *Skinner v. Total Petroleum, Inc., supra* at 1445.

D. THIS WRIT SHOULD BE GRANTED TO MAKE CLEAR THAT THE BINDING EFFECT OF A JURY'S JUDGMENT IS BASED ON THE SEVENTH AMENDMENT.

The various Circuits, including the Seventh, have required that the trial court make its ruling on equitable claims consistent with the jury's verdict in related legal claims. However, the Sixth, Seventh and Eighth Circuits have at times utilized the label of "collateral estoppel" as the basis for this principle. *Ohio-Sealy Mattress Mfg. Co., Inc. v. Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978); *Florists Nationwide Tel. Delivery Network v. Florists Tel. Delivery Assoc.*, 371 F.2d 263 (7th Cir.), *cert. denied*, 387 U.S. 909 (1967);*Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004 (6th Cir. 1987) and *Garza v. City of Omaha*, 814 F.2d 553 (8th Cir. 1987).

Other Circuits, specifically the Third, Fifth, Ninth, Tenth and Eleventh, have properly characterized the rule as being based on the Seventh Amendment. *Miller v. Fairchild, supra*; *Roebuck v. Drexel University, supra*; *Skinner v. Total Petroleum, Inc., supra*; *Ward v. Texas Employment Commission*, 823 F.2d 907 (5th Cir. 1987) and *Lincoln v. Board of Regents*, 697 F.2d 928 (11th Cir.), *cert. denied*, 464 U.S. 826, 104 S.Ct. 97, 78 L.Ed.2d 102 (1983). The Second Circuit, in *Wade v. Orange County Sheriff's Office*, 844 F.2d 951 (2nd Cir. 1988) required the court to follow the jury's findings but was unclear on the legal basis for so ruling, and the District of Columbia Circuit, in *Bouchet v. National Urban League, Inc.*, 730 F.2d 799 (D.C. Cir. 1984)

(Judge Scalia), indicated that the court is bound by the jury's findings, but that issue was not squarely presented for decision.

The Seventh Circuit ruling in this case emphasizes the importance of utilizing a Seventh Amendment analysis to joint legal and equitable claims. Prior to this decision, courts have required the trial court to follow the jury's findings regardless of the label attached to the analysis. Collateral estoppel, however, is a discretionary doctrine that, as this case demonstrates, is applied with the exercise of the trial court's discretion. The Seventh Amendment, on the other hand, is a mandatory constitutional doctrine created, at least in part, to *avoid* the discretionary power of the court. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 343, 99 S.Ct. at 657, 58 L.Ed.2d at 570 (Rehnquist, Chief Justice, dissenting). This Court's intervention is necessary at this juncture to settle this very important constitutional question and establish the appropriate framework for analyzing the relationship between judge and jury in jointly tried lawsuits.

E. THE SEVENTH CIRCUIT'S APPLICATION OF COLLATERAL ESTOPPEL CONFLICTS WITH THE FIRST CIRCUIT DECISION IN *O'REILLY V. MALON*, 747 F.2d 820 (1984).

The Seventh Circuit in this case concluded that Snider did not have a "full and fair opportunity to litigate" her legal claims because Ms. Klein's testimony was excluded from consideration by the jury. The District Court had excluded this testimony from being heard by the jury, a decision that the Court of Appeals found proper. Despite the propriety of excluding this testimony, however, the Court nevertheless ruled that its absence from the jury deprived Respondent of a full and fair opportunity to litigate and, therefore, refused to apply collateral estoppel.

This ruling conflicts with that of the First Circuit in *O'Reilly v. Malon*, 747 F.2d 820 (1984). In that case, the same circumstance was presented, with the opposite result:

> Mission argues that the jury trial was not a full and fair opportunity to litigate its claim because certain relevant evidence was excluded by the district court. . . .[However] '[n]othing prevented [Mission] from prosecuting its action thoroughly and diligently the first time, and it had every incentive to do so. The consequences of the judgment cannot be avoided by contending that it would do better on a second go-round'.

O'Reilly v. Malon, supra, at 823n.3. Likewise, Snider attempted to, and did, diligently pursue its legal claims before the jury. To now claim that the opportunity to litigate was not fair, after abandoning an appeal of that judgment, is a thinly disguised attempt to circumvent the consequences of the jury's verdict. More importantly, it permits the Court, in an exercise of discretionary power, to rule inconsistently with a jury's verdict that had been fully and properly litigated.

II.

THE SEVENTH AMENDMENT REQUIRES THAT THE COURT EITHER ADHERE TO THE JURY'S FINDINGS ON COMMON ISSUES OR SET THOSE FINDINGS ASIDE AS INFIRM IN ACCORDANCE WITH THE COMMON LAW.

The Seventh Amendment requirement that the trial court either follow or invalidate a jury's verdict is reflected in the plain language of the Amendment:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

In this case, it is respectfully submitted that the Seventh Amendment required the Court to adhere to the jury's findings which

were dispositive of Respondent's equitable Title VII claim, unless it had first set those findings aside by granting Snider's post trial motion.

The Seventh Circuit's use of collateral estoppel to evaluate the trial court's equitable decision in light of the jury's prior verdict on legal claims, significantly attenuated Petitioner's Seventh Amendment rights. Once that Court concluded that collateral estoppel applied rather than the Seventh Amendment, a jury's verdict on dispositive facts no longer became binding obligations to the Court when ruling on related equitable claims, but instead could be re-examined and given whatever effect the Court, in its discretion, deemed appropriate.

The facts in this case provide a clear illustration of the Seventh Circuit's erosion of Seventh Amendment rights. The gravamen of Snider's state tort legal claims was that Delloma assaulted and touched her in an offensive manner. The jury did not believe her and returned unanimous verdicts against Snider. Snider's motion for j.n.o.v. or a new trial were denied and her appeal subsequently abandoned. Thus, the jury's verdict is final and cannot be overturned.

Snider's equitable Title VII claim is based on the identical factual allegations made in the state tort claims. When the District Court reached a result based on its view of the credibility of the witnesses it clearly "re-examined" the facts as found by the jury. The Seventh Circuit's sanction of this departure from the Seventh Amendment through the rubric of collateral estoppel, effectively eviscerated the mandatory constitutional obligation to follow a jury's findings and substituted a discretionary judge made doctrine in its place. In so doing, the Court improperly

lowered the sanctity of a jury verdict below that of the discretionary power of a trial court. [3]

The fact that sexual harassment expert Klein was not heard by the jury does not make any difference in the Seventh Amendment requirement to follow a jury's verdict. Her testimony, no matter how compelling, simply cannot justify ignoring the considered judgment of the jury. While it is conceded that the failure of Klein to testify before the jury could have been used as a factor by the District Court to invalidate the jury's verdict, as permitted by the Seventh Amendment, that is not what happened in this case. Instead, the Seventh Circuit improperly used Klein's testimony to dilute Petitioner's Seventh Amendment rights by citing it as the reason for *not* following the jury's judgment under its collateral estoppel rationale.

Each of these court decisions prior to the Seventh Circuit decision in this case, have a common thread: The Seventh Amendment is a constitutional obligation that takes priority over the discretion of the trial court. Once facts are found by the jury, the court either has to follow those findings when deciding related equitable claims, or the court must invalidate the jury's findings in accordance with common law. Even those courts utilizing the label of collateral estoppel require the same result. The Seventh Circuit's decision in this case contravenes this basic principle by permitting the trial court discretion to preserve the jury verdict yet reach an inconsistent decision on common issues raised in any equitable claim. This reverses the constitutional

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[3] This case may well suffer from the maxim that "bad facts make bad law." The details of the allegations by Snider constitute very serious misconduct on the part of Delloma. Those details, however, simply are not relevant to the very important constitutional question raised by this Writ. The extent, if any, that these facts tainted the Court's decision in this case will of course never be known. However, the residual legal principle left by the Court will have a far reaching and adverse impact on the Seventh Amendment rights of a litigant in *any* jointly tried lawsuit.

priority between the power of the judiciary and the requirements of the constitution, and should not be countenanced by this Court.

CONCLUSION

For the foregoing reasons, this Court should grant this Petition for Writ of Certiorari and reverse the decision of the Court of Appeals in this matter.

DATED: November 20, 1992

Respectfully submitted,

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November 20, 1992

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 91-1314

SHARON SNIDER,
Plaintiff-Appellee,

v.

CONSOLIDATION COAL COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Illinois, East St. Louis Division.
No. 86 C 3462—**William D. Stiehl**, *Judge.*

ARGUED MAY 22, 1992—DECIDED AUGUST 26, 1992

Before BAUER, *Chief Judge,* MANION, *Circuit Judge,* and GIBSON, *Senior Circuit Judge.*[1]

GIBSON, *Senior Circuit Judge.* Consolidation Coal Company (hereinafter "Consol") appeals the district court's judgment in favor of Sharon Snider on her Title VII claim, contending the trial court was estopped from believing Snider's testimony by virtue of a jury verdict on tort claims heard and disposed of in this proceeding. Consol also challenges the district court's award of front and back pay. We affirm.

I. BACKGROUND

Beginning in July of 1979, Snider worked at a coal mine owned by Consol that is referred to as "Burning Star #4" and is

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[1] The Honorable Floyd R. Gibson, Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, is sitting by designation.

located in Cutler, Illinois. In late 1979 or early 1980, Richard Delloma began working at the mine as its Assistant Superintendent; in January 1982, he was promoted to Superintendent. As the mine's superintendent, Delloma was the highest ranking company official on the premises, and he had authority over sixty salaried and 267 hourly employees. Seventeen of these employees were female.

In 1984, Snider and Delloma had some form of relationship, though they vehemently disagree about the nature of that relationship. According to Snider, Delloma began making unwanted advances in 1982. Snider alleges that on numerous occasions, Delloma expressed his desire to have sex with her, and promised her easier job assignments in return. When Snider declined, Delloma began assigning her more difficult work and refusing to approve her absences. In July 1984, Delloma threatened to fire Snider and tell her husband about her affairs with two other miners unless she agreed to sleep with him. Faced with these threats, Snider gave in to his demands. On one occasion in September 1984, at a time when both were working at the mine, Delloma allegedly physically forced Snider to perform oral sex. Consol fired Delloma in January 1985 for "sexual harassment and unacceptable relations with employees who worked directly for him."

Delloma's version of the facts, as indicated, is different from Snider's. He denies threatening or otherwise harassing Snider. He admits that they had sexual relations at his house, but insists their encounters were completely consensual. He also admits to having had sexual relationships with at least nine other female employees over whom he had supervisory control, but insists all these relationships were also consensual.

In September 1985, Snider attempted suicide by taking an overdose of heart medication. She was hospitalized for several days and obtained psychiatric care. In November, she attempted

to return to work, but found the experience traumatizing. In April 1987, her doctor advised her not to return to work, and she began an indefinite sick leave that continues at this time.

In July 1986, Snider filed suit against Consol and Delloma, alleging sexual harassment under Title VII and a variety of state-based tort claims. Snider dismissed some of the tort claims prior to trial; trial commenced in May 1989 on her claims for assault, battery, intentional infliction of emotional distress,[2] and negligent hiring/retention/supervision.[3] A jury was impaneled to decide the tort claims, while the court was to try the Title VII claim.

At trial, the two primary witnesses were Snider and Delloma; Snider set forth her allegations, and Delloma denied them. The remaining witnesses' testimony primarily[4] addressed the credibility of Snider and Delloma; in fact, the strategy of both defendants was to launch a full-scale assault on Snider. Without detailing all the arenas of attack, we note that the defense counsel focused much of their energies on emphasizing that Snider never complained about Delloma's activity to anyone, and that none of the other women Delloma supervised—including those he had dated and had sexual encounters with—ever raised allegations of sexual harassment. In their closing arguments, both defendants' attorneys focused on these facts in describing Snider as a "liar."

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[2] Both Delloma and Consol were defendants on these claims, as well as on the Title VII claim.

[3] Only Consol was named as a defendant on this count.

[4] We note that there was also testimony to indicate Delloma's supervisors had reason to know he dated his female subordinates, that Delloma had been warned not to date his female subordinates, and that no record of this warning was contained in Delloma's personnel file. Snider's doctor also testified about Snider's physical and emotional condition and suggested that she should not work at the mine again.

Snider attempted to elicit the testimony of Dr. Freada Klein, an expert who consults with and advises companies on the problems of sexual harassment in the workplace. Based on Snider's offer of proof, the court determined the probative value of Dr. Klein's testimony would be outweighed by the prejudicial effect it would have on the jury, and refused to allow the jury to hear Dr. Klein's testimony. However, with respect to the Title VII claim, the court concluded Dr. Klein's testimony was more relevant, and the risk of prejudice was diminished; therefore, the court heard Dr. Klein's testimony outside of the jury's presence.[5]

Dr. Klein was able to testify about sexual harassment in general, but she had not interviewed Delloma or Snider, nor had she examined the operations at Burning Star #4 or any other component of Consol's operation.[6] Instead, she testified about the problems faced by women working in traditionally male-dominated industries (such as coal mining), as well as the unique problems presented by romances between supervisors and their subordinates. She stated that she did not believe dating relationships between supervisors and subordinates could be truly consensual and voluntary, but that in those cases when the relationship appeared truly voluntary, she advised the company to remove the subordinate employee from the supervisor's control with respect to business matters. She also explained that over 95% of the victims of nonconsensual relationships—whether sexual or merely social—did not complain or report the problem due to a fear of reprisal or loss of privacy.

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[5] Consol has not appealed the court's decision to admit Dr. Klein's testimony for purposes of the Title VII claim. Snider dismissed her appeal of the court's decision to exclude Dr. Klein's testimony from the jury-tried portion of this case.

[6] We suspect this is the reason the court concluded the danger of undue prejudice outweighed the probative value of Dr. Klein's testimony.

The jury returned verdicts in favor of the defendants on all counts. Snider filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial based on several evidentiary points; among these was a claim that the court improperly barred Dr. Klein from testifying before the jury. The court reiterated that it relied on Federal Rule of Evidence 403[7] to exclude Dr. Klein's testimony, and then stated that "[t]o the extent that plaintiff asserts that Klein's testimony would have served to bolster plaintiff's credibility, that claim is of no legal value." *Snider v. Consolidation Coal Co.*, No. 86-3462, slip op. at 4 (E.D. Ill. June 27, 1990) (memorandum and order denying j.n.o.v. and new trial).

The same day the district court denied Snider's motions for j.n.o.v. and new trial, it rendered its decision in favor of Snider and against Consol[8] on the Title VII claim. In so doing, the court made thirty specific factual findings, six of which were based exclusively on Dr. Klein's testimony. The court also stated that Snider's "reluctance to file a formal complaint against Delloma is consistent with the patterns exhibited by subordinate employees who are subjected to sexual harassment by their supervisors. The Court finds that although plaintiff did not file a union grievance or a formal EEOC complaint, the attention by Delloma was unwelcome and constituted sexual harassment." *Snider v. Consolidation Coal Co.*, No. 86-3462, slip op. at 12-13 (E.D. Ill. June 27, 1990) (memorandum and order on Title VII claim). The court awarded Snider front pay, back pay, interest, and attorney fees.

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[7] Rule 403 states in pertinent part that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, ..."

[8] The court concluded damages were not available against Delloma and therefore found in his favor on the Title VII claim; Snider does not appeal this decision.

II. DISCUSSION

A. Judgment on the Title VII Claim

Consol argues the jury's verdicts in favor of the defendants on the tort claims is inconsistent with the judge's verdict in favor of Snider on the Title VII claim. Specifically, Consol contends the jury obviously disbelieved Snider; had the jury believed Snider, it could not have rendered judgments for the defendants. Consequently, the judge was barred from believing any of Snider's testimony when deciding the outcome of the Title VII claim.

When a lawsuit involves both legal and equitable claims, the legal claims must be decided by the jury before the court resolves the equitable claims. This ordering of events is required so that the judge's decision with respect to the equitable claims does not bind the jury's decisionmaking ability with regard to factual issues common to both the legal and equitable claims, thereby undermining the guarantees of the Seventh Amendment. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 334 (1979). This ordering of events, designed to prevent the jury from being bound by the judge's factual findings, creates situations in which the judge may be bound by the jury's factual findings. Indeed, this court has held that when common issues are simultaneously tried to both a judge and a jury, the jury's findings with respect to those common issues are binding upon the judge. *E.g., Williamson v. Handy Button Mach. Co.,* 817 F.2d 1290, 1293-94 (7th Cir. 1987); *Hunter v. Allis-Chalmers Corp., Engine Div.,* 797 F.2d 1417, 1421 (7th Cir. 1986). This latter rule of law has been variously characterized as mandated either by the Seventh Amendment or by notions of collateral estoppel. *See McKnight v. General Motors Corp.,* 908 F.2d 104,113 (7th Cir. 1990) (recognizing and criticizing both bases for the rule), *cert. denied,* 111 S. Ct. 1306 (1991). In its briefs, Consol has characterized its argument as resting on both principles, but at oral argument conceded the analysis would be the same whether we analyzed

this case under the Seventh Amendment or collateral estoppel. We believe the rule that binds the judge to the jury's findings is grounded in collateral estoppel and not the Seventh Amendment, *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 844 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); *Florists Nationwide Tel. Delivery Network v. Florists Tel. Delivery Assoc.*, 371 F.2d 263, 270 (7th Cir. 1967), *cert. denied*, 387 U.S. 909 (1967); *see also Kitchen v. Chippewa Valley Schools*, 825 F.2d 1004, 1014 (6th Cir. 1987); *Garza v. City of Omaha*, 814 F.2d 553, 557 (8th Cir. 1987), and therefore will apply traditional collateral estoppel principles.

For purposes of this appeal, Snider has conceded that the issues in the legal and equitable claims were common, and that the jury's verdict is inconsistent with the judge's decision.[9] Nonetheless, collateral estoppel cannot be applied unless the party against whom it is to be applied had a "full and fair opportunity" to litigate the issue in the prior proceeding. *Allen v. McCurry*, 449 U.S. 90, 95 (1980) (quotation omitted). A party has not had the requisite full and fair opportunity if he or she was unable to present critical evidence in the initial proceeding. *Jack Faucett Assoc. v. American Tel. & Tel. Co.*, 744 F.2d 118, 126 (D.C. Cir. 1984) (citing *Blonder-Tongue Laboratories v. University of Illinois Found.*, 402 U.S. 313, 333 (1971)), *cert. denied*, 469 U.S. 1196 (1985); *see also Butler v. Stover Bros. Trucking Co.*, 546 F.2d 544, 551 (7th Cir. 1977) (collateral estoppel not applied because Dead Man Act barred crucial testimony in first proceeding).

In the case at bar, crucial evidence was allowed in the Title VII hearing that was not (and could not be) presented to the jury; namely, Dr. Klein's testimony. The jury's verdict turned on one

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[9] This opinion should not be construed as holding that the judge's decision was inconsistent with the jury's verdict. We merely accept this proposition for purposes of this appeal because Snider does not challenge it.

single issue: whether the jurors believed Snider's version of the events, or wh[illegible]hey believed Delloma's. Two of the key facts relied upon by the defendants' attorneys in attacking Snider's veracity was her failure to complain about Delloma's actions and the failure of any other subordinate who dated Delloma to complain about harassment. Dr. Klein's testimony addressed this issue by making it clear that few victims of sexual harassment make a contemporaneous complaint, particularly if the harassment occurs in an occupation traditionally dominated by members of the opposite sex. While we cannot say for certain that the jury's verdict would have been different had it heard this evidence, we do not need to make such a determination; all that is necessary is that Dr. Klein's testimony went to a key issue in the case and was sufficient to support the judge's decision.

Consol alleges Dr. Klein's testimony cannot have made a difference because 1) she did not have knowledge about the parties, 2) she used an incorrect definition of sexual harassment, and 3) the trial judge, in rejecting Snider's motion for a new trial, held her testimony did not buttress Snider's credibility. We reject each of these contentions. First, Dr. Klein's expert testimony about the tendencies of victims of sexual harassment did not require specific knowledge about the parties. Experts routinely offer general testimony about their field of expertise without knowledge of the case at bar. Furthermore, Dr. Klein explicitly stated she had no knowledge about the parties, so we do not believe the trial judge was somehow deceived into thinking she was testifying specifically about Snider's complaints. Second, we do not believe Dr. Klein used an incorrect definition of sexual harassment. Consol points to Dr. Klein's testimony wherein she expressed her doubts as to whether a dating relationship between a supervisor and a subordinate could ever be consensual. Nonetheless, Dr. Klein went on to describe the advice she gave to companies when a true "office romance" developed. She also described sexual harassment in terms that are wholly consistent with the law. Finally, and perhaps most

importantly, we note that Consol does not ask us to reverse the district court for applying the wrong legal standard;[10] consequently, there can be no claim of error over use of the wrong legal standard. Finally, we do not believe the district court held Dr. Klein's testimony failed to support Snider's credibility. If this contention were true, there would be no reason for the district court to detail Dr. Klein's testimony in its ruling on the Title VII claim. Moreover, we believe Consol has misconstrued the court's denial of Snider's motion for new trial. The court explained that Dr. Klein's testimony was withheld from the jury because its probative value was outweighed by the danger of undue prejudice. Snider contended Dr. Klein's testimony was necessary to support Snider's veracity; the district court characterized this argument as lacking *legal* effect. In other words, the court held the proffered need for Dr. Klein's testimony had no impact on the court's legal analysis under Rule 403; the court did *not say* the testimony was to be kept out of the jury trial because it did not buttress Snider's credibility. Because Dr. Klein's testimony was critical to an important issue in the case, but was excluded from the jury trial through no fault of the plaintiff,[11] the district court did not improperly render a decision contrary to the findings of the jury.

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[10] Consol does complain about finding number thirty, in which the district court found "[i]n an employment situation where less than 10% of the employees are female; where there are no available complaint channels; where the individuals to whom the sexual attention is directed feel economically dependent; and where a dominant male supervisor has relationships with several of the female employees, those relationships would not qualify as truly voluntary or consensual." *Snider v. Consolidation Coal Co.*, No. 86-3462, slip op. at 7 (E.D. Ill. June 27, 1990) (memorandum and order on Title VII claim). However, this complaint is not urged as an independent ground justifying reversal. Moreover, this finding, filled as it is with specific factual references, falls far short of a holding that there can *never* be a voluntary relationships between supervisors and subordinates.

[11] Thus, if the district judge had allowed the jury to hear Dr. Klein's testimony, our decision would be different.

B. Damages

Consol raises two arguments regarding the court's award of damages. It first argues no monetary award is justified by the facts of this case, and then argues front pay is not available under Title VII.

"Title VII only provides for equitable relief; a district court cannot award damages, either punitive or compensatory, to redress a violation of Title VII. Consequently, a district court may award back pay to a plaintiff only as an equitable remedy, i.e., if a plaintiff can demonstrate that the defendant discharged him or her, either actually or constructively." *Brooms v. Regal Tube Co.*, 881 F.2d 412, 423 (7th Cir. 1989) (citation omitted). Given the district court's findings in this case, we have no trouble concluding that the conduct to which Snider was subjected "would cause a reasonable employee in [Snider's] position to contemplate immediate departure" and that "a reasonable employee would have felt compelled to resign under the circumstances of this case." *Id.* This differentiates this case from *King v. Board of Regents of the Univ. of Wis. Sys.*, 898 F.2d 533 (7th Cir. 1990), where the district court properly declined to award back pay as an equitable remedy because, though the plaintiff lost her job, "she did not prove that harassment caused the loss. . . ." *Id.* at 537. In the case at bar, the district court's findings amount to a finding that Snider was constructively discharged, meaning the harassment did cause the loss of Snider's job; thus, the back pay award was permissible.

Consol also claims a monetary award was improper because Snider did not request reinstatement. However, the district court specifically found that "[u]nder the facts here presented, it would be neither practical nor reasonable to order reinstatement." *Snider v. Consolidation Coal Co.*, No. 86-3462, slip op. at 2 (E.D. Ill. Jan. 8, 1991) (memorandum and order granting plaintiff's motion to amend judgment). We have previously affirmed an award of back pay when the plaintiff proved (and the district

court found) constructive discharge even though the plaintiff "did not allege constructive discharge in connection with her Title VII claim and did not ask for back pay, front pay, or prejudgment interest." *Brooms*, 881 F.2d at 423. Based upon the above statement of the district court, and our determination that the proof and judicial findings in this case amounted to a finding of constructive discharge, we rely on *Brooms* to affirm the back pay award.

Finally, Consol argues equitable relief in the form of front pay is not available under Title VII. However, this argument was not presented to the district court,[12] nor does it appear in Consol's initial brief in this appeal. The argument was presented for the first time in Consol's reply brief. Generally, we will not consider an argument that was raised for the first time on appeal, and "[w]e will not consider an argument made for the first time in the appellant's reply brief." *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 220 (7th Cir. 1986). On this basis, we affirm the district court's award of front pay.[13]

III. CONCLUSION

Because crucial evidence was presented to the judge but kept from the jury (in spite of the plaintiff's efforts), the judge's equitable determinations were not dictated by the jury's findings on the legal claims. We also hold Snider was entitled to the back pay award because no reasonable employee would have continued working for Consol under these circumstances. Finally, we

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[12] In fact, in Consol's memorandum opposing Snider's motion to amend the judgment to include front pay, Consol specifically referred to front pay as an equitable remedy that could be awarded in the discretion of the trial court. R. 272 at 4.

[13] Thus, whether a district court may order front pay as part of the equitable relief permitted by Title VII remains an open question in this circuit. *See Fortino v. Quasar Co.*, 950 F.2d 389, 398 (7th Cir. 1991).

affirm the front pay award because Consol effectively waived its objection that Title VII did not permit the award by failing to raise this argument before the district court.

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: August 26, 1992

BEFORE: **Honorable** William J. Bauer, Chief Judge

Honorable Daniel A. Manion, Circuit Judge

Honorable Floyd R. Gibson, Senior Circuit Judge*

No. 91-1314

SHARON SNIDER,
Plaintiff - Appellee

v.

CONSOLIDATION COAL COMPANY,
Defendant - Appellant

Appeal from the United States District Court for the
Southern District of Illinois, East St. Louis Division
No. 86 C 3462, Chief Judge William D. Stiehl

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

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* The Honorable Floyd R. Gibson, Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, is sitting by designation. (1061-030690)

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 28, 1992,

Before
Hon. WILLIAM J. BAUER, Chief Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. FLOYD R. GIBSON, Senior Circuit Judge[1]

No. 91-1314

SHARON SNIDER
Plaintiff-Appellee,

v.

CONSOLIDATION COAL COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Illinois, East St. Louis Division.
No. 86 C 3462
William D. Stiehl, Judge.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-captioned case by the Consolidation Coal Company, all of the judges on the original panel have voted to deny and none of the judges in active service has requested a vote thereon.

Therefore, the petition for rehearing with suggestion for rehearing en banc is DENIED.

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[1]The Honorable Floyd R. Gibson, Senior Judge of the United States Court of Appeals for the Eighth Circuit, is sitting by designation.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CAUSE NO. 86-3462

SHARON SNIDER,
Plaintiff,

v.

CONSOLIDATION COAL COMPANY and
RICHARD C. DELLOMA,
Defendant.

MEMORANDUM AND ORDER

STIEHL, District Judge:

This matter is before the Court for determination on the merits of plaintiff's Title VII claim. The common-law tort claims were tried before a jury and verdicts were returned in favor of the defendants on each of the tort claims. The court has previously denied plaintiff's motion for judgment n.o.v. or for new trial. In accordance with Fed. R. Civ. P. 52, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Sharon Snider is a female coal miner who began working for defendant Consolidation Coal Company (Consol) in July of 1979. At the time of the trial of this matter, she was 36 years old, married, with two children. At all times relevant to this litigation, she was an hourly employee at the coal mine known as Burning Star #4, Cutler, Illinois.

2. Defendant Consol is a Delaware corporation with its headquarters in Pittsburgh, Pennsylvania. Consol owns and operates Burning Star #4 as well as other mines in Illinois.

3. Defendant Richard C. Delloma was employed at Burning Star #4 as an assistant superintendent in August of 1979. He was promoted to superintendent in January of 1982. As Superintendent, Delloma was the highest ranking company official at Burning Star #4. He was terminated on January 8, 1985 for "sexual harassment and unacceptable relations with employees who worked directly for him." (Plaintiff's Exhibit #1).

4. As superintendent, Delloma had authority over more than 60 salaried and 267 hourly employees. Of these employees, only 17 were female.

5. Burning Star #4 is a large strip mine covering several square miles. Coal is extracted from large pits by heavy machinery. The mine office was located some 3 miles from the center of the pit and 6 miles from the far side of the pit.

6. The mine office is located at the top of the pit. At the mine office are offices where the shift employees get their orders, men's and women's wash houses, employee lockers, and gas pumps for the vehicles.

7. Whenever female employees would need to use the restroom, they would have to be picked up from where they were operating their mining equipment and transported to the mine office by supervisors in company pick-up trucks.

8. Delloma was sexually attracted to the plaintiff and had pursued plaintiff since 1982. As superintendent, he would frequently make himself available to drive plaintiff to the restroom.

9. Delloma had dated, and had sex with a number of the female employees at Burning Star #4. Delloma often took these female employees to social events, either sponsored by Consol, or where other Consol personnel, including Delloma's superiors, were present.

10. John Shotten was a Vice-President with Consol in charge of Illinois surface operations from 1979 through 1984. Delloma

reported to Shotten during that time. Delloma had total responsibility for Burning Star #4 and considered Burning Star #4 to be his mine.

11. In the time period of 1983 and 1984, Delloma was cautioned by Shotten that he should not date subordinate employees. This conversation resulted from information given to Shotten that Delloma had traveled to Mexico with a female employee (not plaintiff). Shotten told Delloma that he should not relate to female subordinate employees in that manner. Delloma responded that he was smart enough to keep a situation like that from affecting his job.

12. Despite the caution, Shotten did not make an entry in Delloma's personal file to that effect, nor did he conduct any investigation or make any inquiry concerning Delloma's conduct. Shotten did not inquire whether any women at Burning Star #4 had any difficulty with sexual harassment at that time.

13. Beginning in approximately 1982, Delloma began inviting plaintiff to meet him after work for drinks. Although plaintiff rebuffed these invitations, Delloma frequently approached plaintiff with similar requests. This pattern continued through May of 1983.

14. After May of 1983, the requests by Delloma included requests for her to go to bed with him. Plaintiff refused these requests.

15. Thereafter, Delloma began disapproving plaintiff's absences from work, although similar absence slips had been approved in the past, and were regularly approved for other employees. Delloma offered to authorize plaintiff's absences in return for sexual favors. Plaintiff refused Delloma's offers.

16. On February 17, 1984, plaintiff received an "irregular worker" letter from Delloma advising her that she was subject to progressive discipline due to her six unexcused absences. Termi-

nation was a possible result of a certain number of unexcused absences. After receiving the irregular work letter, plaintiff sought assistance from her union representative, who, in turn, spoke with Delloma about the absences. Thereafter, Delloma threatened to fire plaintiff, and warned her not to call a union representative or send anyone in on him again.

17. Delloma continued to subject plaintiff to requests for sexual favors in exchange for favorable treatment at her job.

18. In July of 1984, plaintiff gave in to Delloma's requests and had three or four sexual encounters with Delloma at his residence.

19. Although Delloma made conflicting statements as to the duration of his relationship with plaintiff (stating in an affidavit dated August 20, 1986, that they had a consensual relationship from June through November, 1984; stating during an investigation in September of 1985, by Consol Industrial and Employees Relations Manager Philip Nicholson, that the relationship lasted only through September of 1984; and, finally, on direct examination at trial, stating that the last consensual relationship was in July of 1984), the Court is persuaded that plaintiff and Delloma had a sexual relationship from July through September, 1984.

20. Although Consol had company policies against sexual harassment during the time in question, the dissemination of this information to the female employees was not effective. Other female employees were subject to sexual harassment by male employees, but were either unaware of the proper channels for lodging a complaint, or reluctant to complain because of concerns about job security. (Tr. III-29,30).

21. During Delloma's tenure as superintendent of Burning Star #4, there were lockers in the corridor outside the tipple (coal washing area) lunch room which had, for handles, models of women's breasts. These handles were allowed to remain on the

lockers in the corridor for a period of months. There were Consol supervisors who worked in the tipple who utilized the corridor in question several times each day.

23. Plaintiff's experiences with Delloma resulted in both physical and psychological problems, including marital difficulties. Plaintiff suffered a mental breakdown on January 7, 1985, which required hospitalization and resulted in depression. In September of 1985, plaintiff attempted suicide. Since the failed suicide attempt, plaintiff has required psychiatric treatment. Plaintiff has been on sick leave from Consol since April of 1987.

24 . On January 17, 1985, plaintiff filed a sexual harassment complaint with the Illinois Human Rights Commission. She had not, prior to that date, made a formal complaint with Consol or the Human Rights Commission regarding her treatment by Delloma.

25 . Dr. Freada Klein testified on behalf of plaintiff relative to her research of sexual harassment in the work place. The Court finds that 1% of working females are subjected to sexual harassment. Of those who were subjected to harassment only 5% make complaints of sexual harassment. There are two common reasons given by those who have actually suffered sexual harassment for their failure to report the harassment. They are: fear of reprisal, and fear of the loss of privacy. These reasons are consistent in both union and non-union employment situations.

26. Among those acts which qualify as severe sexual harassment is sexual intercourse.

27. In the private sector, the single largest category of harassment is perpetuated by superiors upon subordinates. Truly consensual or voluntary relationship are rare when a power differential exists, and remains after the relationship is commenced.

28. In non-traditional occupations, that is occupations previously held by one gender, a higher rate of sexual harassment results. The forms of harassment experienced are more severe, of a longer duration than that experienced in traditional occupations, and this harassment has a greater effect on the individual's self esteem and job performance.

29. In non-traditional, union occupations, the union grievance procedure is generally inadequate to handle sexual harassment situations, and employees are frequently reluctant to use the formal grievance procedure.

30. In an employment situation where less than 10% of the employees are female; where there are no available complaint channels; where the individuals to whom the sexual attention is directed feel economically dependent; and where a dominant male supervisor has relationships with several of the female employees, those relationships would not qualify as truly voluntary or consensual.

CONCLUSIONS OF LAW

The Court has jurisdiction over plaintiff's claim of unlawful sex discrimination and sexual harassment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. sec. 2000e, et seq. Plaintiff has satisfied all of the conditions precedent for the bringing of this action.

Section 703(a)(1) of Title VII, 42 U.S.C. sec. 2000e-2(a)(1), provides: "it shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . sex . . . ."

I. SEX DISCRIMINATION

In *Volk v. Coler*, 845 F.2d 1422, 1436 (7th Cir. 1988), the court discussed sex discrimination and sexual harassment under Title VII.

> Liability under Title VII for sex discrimination and sexual harassment in employment exists where a victim can "prov[e] that discrimination based on sex has created a hostile or abusive work environment . . . ." [*Meritor Sav. Bank v.*] *Vison,* [477 U.S. 57, 106 S.Ct. 2399,] 2405-06. In *Vison,* the Court adopted guidelines from the Equal Employment Opportunity Commission "holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 2405.

It was clear from the evidence adduced at the trial that plaintiff's claim of sex discrimination is based on sexual harassment, not disparate treatment. There was no evidence offered, nor did plaintiff argue in her proposed findings of fact and conclusions of law that the defendants treated her any differently with respect to any employment decision based on her sex. *Accord Price Waterhouse v. Hopkins,* __ U.S. __, 109 S.Ct. 1775 (1989).

The Court finds that there was no evidence of sex discrimination based on disparate treatment under Title VII.

II. SEXUAL HARASSMENT

Plaintiff's claim of Title VII rests on sexual harassment. Sexual harassment can take two forms, hostile environment sexual harassment or quid pro quo sexual harassment.

A. HOSTILE ENVIRONMENT

The Seventh Circuit in *King v. Board of Regents of Univ. of Wis. Sys.,* 898 F.2d 533 (7th Cir. 1990), discussed the elements of proof of a hostile environment claim.

> In these cases, a plaintiff establishes her claim by demonstrating that the employer "has created a hostile or abusive working environment." [*Vinson,* 106 S.Ct.] at 2405. Under this analysis, a loss of a tangible job benefit is not necessary

> since the harassment itself affects the terms or conditions of employment. *Bundy v. Jackson*, 641 F.2d 934, 945 (D.C. Cir. 1981). The harassment, however, "must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment." *Vinson*, 106 S.Ct. at 2405 (citations omitted). It must deny the plaintiff "the right to participate in the work place on equal footing with others similarly situated." *Scott v. Sears. Roebuck & Co.*, 798 F.2d 210 (7th Cir. 1986). *See also Bohen v. City of East Chicago, Ind.*, 799 F.2d 1180 (7th Cir. 1986).

Id. at 537. It is clear that a single act may be enough to establish a hostile environment claim, *id., citing, Bohen*, 799 F.2d at 1186-87; however, "repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident." 899 F.2d at 537. In *King*, the Seventh Circuit established the "plaintiff's viewpoint" standard. The court held:

> In applying this test, *we look at the harassment from both the objective and subjective viewpoint of the plaintiff*: in order to find discrimination, the court must conclude that "the conduct would adversely affect both a reasonable person and the particular plaintiff bringing the action." *Brooms v. Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989).

Id. (emphasis added).

B. QUID PRO QUO

The second form of sexual harassment is known as quid pro quo harassment. "In quid pro quo cases, a supervisor demands sexual favors from an employee as a condition of employment. This is exactly the situation where a supervisor's only motivation is to have a conjugal relationship with the employee." 898 F.2d at 539. Furthermore, the Court held that "treatment of [an] individual based on sexual desire is sexually motivated. *Id.*

It was apparent from the evidence adduced at the trial that the plaintiff was subjected to both forms of sexual harassment. Delloma created an environment which was clearly abusive. Moreover, the types of harassment were pervasive and severe. Delloma made it a practice to verbally and physically assault the plaintiff. He made lewd and suggestive remarks and boldly sought plaintiff's sexual favors. Like the situation that existed in *King*, Delloma, by his own admission, was sexually attracted to the plaintiff, and "wanted to have an affair, a liaison, illicit sex, a forbidden relationship. His actions are not consistent with platonic love. His actions were based on her gender and motivated by his libido." 898 F.2d at 539.

Delloma had a history of sexual relationships with a number of the female coal miners even though he had been advised that it was against company policy to date employees. With respect to plaintiff, Delloma pursued her openly both at work and outside of work in front of other employees. Plaintiff rebuffed Delloma's advances for the better part of two years, finally succumbing in July of 1984. The pervasiveness of his harassment created both an abusive and hostile environment.

The harassment became quid pro quo sexual harassment when Delloma demanded sexual favors in exchange for approval of her excuse slips. This behavior, which lasted for more than a year, from May, 1983 through the summer of 1984, clearly became a condition of employment because Delloma knew that without his approval plaintiff could face termination if her unexcused absences exceeded a specific number. Clearly Delloma's only motive in refusing to authorize her absences was to have conjugal relations with the plaintiff. This is evident from the fact that Delloma had authorized similar excused absence requests from plaintiff without comment before her refusal to have sex with him. Delloma offered to approve her absence requests in exchange for sexual favors. When plaintiff sought assistance from a union representative with respect to the unexcused absences, Delloma threatened to fire plaintiff.

The harassment by Delloma was ongoing in nature and constituted a continuing violation of Title VII. Thus, the Court will consider all of Delloma's acts, not merely those that occurred in the 300 days preceding the filing of the complaint with the Illinois Human Rights Commission. *Bartness v. Drewrys USA. Inc.*, 444 F.2d 1186, 1188 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971). Moreover, viewing the harassment from plaintiff's perspective, and the standard set forth in *King*, the Court is convinced that Delloma's advances were unsolicited and not welcomed by plaintiff. Although the Court has found that plaintiff had a sexual relationship with Delloma from July through September of 1984, the Court is persuaded that this was not a truly consensual relationship. In this non-traditional occupation, Delloma evidenced the attitude that both the coal mine and the employees were his to direct. He had the power to fire plaintiff and often threatened to do so. The carrot he held before the plaintiff was that if she acquiesced to his sexual demands, she could retain her job.

Plaintiff's reluctance to file a formal complaint against Delloma is consistent with the patterns exhibited by subordinate employees who are subjected to sexual harassment by their supervisors. The Court finds that although plaintiff did not file a union grievance or a formal EEOC complaint, the attention by Delloma was unwelcome and constituted sexual harassment.

III. LIABILITY OF THE DEFENDANTS

Having determined that plaintiff did suffer sexual harassment in violation of Title VII as a result of Delloma's actions, the Court must now determine the liability of the defendants.

A. DEFENDANT CONSOL

Consol is an "employer" subject to the provisions of Title VII. Title VII prohibits an employer, acting through a supervisory employee, from sexually harassing an employee or imposing

sexual considerations upon the employee as a condition of her employment. *Volk*, 845 F.2d at 1437 (7th Cir. 1988); *Horn v. Duke Homes. Div. of Windsor Mobil Homes*, 755 F.2d 599, 603 (7th Cir. 1985). Under the facts of this case, the Court finds that Consol is strictly liable for the actions of its supervisory agent, Richard C. Delloma.

B. DEFENDANT DELL0MA

The liability of Delloma, however, is not so clear as is Consol's. Turning to the plain language of the complaint, the Court finds that Delloma is sued solely in his official capacity. Count I, paragraph 4 of the supplemental complaint, alleges: "Defendant Richard C. Delloma, Superintendent of Burning Star #4 Coal Mine from about 1980 until about January 1985, was also plaintiff's employer within the meaning of Title VII when plaintiff's causes of action arose." This language does not constitute an allegation against Delloma in his individual capacity.

Because the plaintiff specifically seeks recovery against Delloma as an "employer" the Court finds that this is an action against him in his official capacity. Therefore, applying the analysis developed in civil rights actions brought pursuant to 42 U.S.C. sec. 1983, when an individual defendant is sued in his official capacity, here as an "employer," that action is the same as an action against the company for whom the individual worked. *See Monell v. New York City Dep't of Social Serv.*, 436 U.S. 658, 690 n.55 (1978); *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982). Even if this pleading could be termed "ambiguous" as to whether the official is sued in his official or individual capacity, the Seventh Circuit in *Kolar v. City of Sangamon*, 756 F.2d 564, 568 (7th Cir. 1985), established a rebuttable presumption that a suit against an official constitutes an official capacity suit. Applying that holding to the case at bar, the fact that Delloma was sued as an "employer" under the terms of Title VII, makes this an official

capacity suit, and, therefore, a suit against Consol. *See. e.g. Bertoncini v. Schrimpf,* 712 F. Supp. 1336, 1340 (N.D. Ill. 1989). This finding is supported by the fact that plaintiff did not attempt to prove or to argue, either in trial or in her proposed findings and conclusions, that Delloma acted in a way other than as supervisory agent of Consol.

Moreover, the statutory limitations on damages available to the plaintiff supports the finding that the claim against Delloma is identical to and the same as the suit against Consol. The Seventh Circuit has held that in a Title VII sexual harassment case plaintiff is limited to the damages of reinstatement, back pay and attorney's fees. *King*, 898 F.2d at 537. As the *King* opinion noted, "compensatory, nominal, and punitive damages are not available under Title VII." Plaintiff has limited her federal claim to Title VII. Therefore, because plaintiff is limited in her damages to the type of damages that only the employing entity could provide, the Court finds that damages are not available against the defendant Richard C. Delloma who is sued in his official capacity as an "employer." Therefore, the Court finds in favor of defendant Delloma and against plaintiff.

IV. DAMAGES

Plaintiff's damages, as discussed, are limited to reinstatement, back pay and attorney's fees. 42 U.S.C. sec. 2000e-5(g). Plaintiff does not seek reinstatement, but asks for judgment against the defendant "for the economic consequences of their conduct . . ." together with attorney's fees and costs. Evidence was adduced at the trial that plaintiff has had a net loss of $86,884 (Tr. III-84), plus $12,500 in lost interest (Tr. III-85). Therefore, the Court finds in favor of plaintiff and against defendant Consol and further finds that plaintiff is entitled to back pay in the amount of $99,384, plus reasonable attorney's fees. The Court further finds that defendant Delloma is not entitled to recover attorney's fees and costs from plaintiff.

Plaintiff shall submit an affidavit as to reasonable attorney's fees within ten (10) days of the date of this order. Objections, if any, shall be filed five (5) days thereafter.

IT IS SO ORDERED.

DATED: 27 June 1990

/s/William D. Stiehl
District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CAUSE NO. 86-3462

SHARON SNIDER,
Plaintiff,

v.

CONSOLIDATION COAL COMPANY and
RICHARD C. DELLOMA,
Defendants.

MEMORANDUM AND ORDER

[Filed: Jan. 8, 1991]

STIEHL, District Judge:

Before the Court is plaintiff's motion to alter or amend judgment pursuant to **Fed. R. Civ. P. 56(e)**. Plaintiff asks the Court to award additional back pay and to award future damages, front pay. Defendant, Consolidation Coal Company, has filed an objection to this motion.

BACKGROUND

On June 27, 1990, this Court found in favor of plaintiff and against Consolidation on plaintiff's Title VII claim. The Court awarded damages through the time of trial in the amount of $99,384. Plaintiff filed a timely motion to alter or amend.

BACK PAY

The plaintiff asks the Court to award additional back pay for lost wages from the time of trial through the time of the finding of liability, minus interim earnings, plus interest.

Upon review of the record, the Court finds that plaintiff's motion as to back pay is well taken. The Court finds that it is proper, under the facts of this case, to award plaintiff back pay up to and including the time of the Court's finding of liability. Accordingly, the Court awards the following: back pay, including interest, in the original amount of $99,384, plus back pay from trial to date of the Court's finding of liability, after giving credit of $7,551.64 for interim earnings, in the amount of $38,151.52, plus interest on the latter amount in the sum of $3,445.13, for a total back pay award, including interest, of $140,980.65.

FRONT PAY

Front pay is an equitable remedy and is awarded within the Court's discretion. Larson, *Employment Discrimination*, Vol. 2, sec. 55.34, pp.11-80.59-61. Front pay is awarded in situations where the Court finds it likely that reinstatement would be impossible or impracticable. B. Schlei, P. Grossman, *2 Employment Discrimination Law*, p. 1398. Under the facts here presented, it would be neither practical nor reasonable to order reinstatement. However, upon review of the record, and in light of the fact that plaintiff has not been employed by defendant for a number of years, the Court finds that an award of front pay for a period of one year will allow plaintiff a reasonable time to assume a new position. Accordingly, the Court awards $31,132 in front pay.

CONCLUSION

In summary, the Court GRANTS plaintiff's motion to amend. Damages are awarded in favor of plaintiff Sharon Snider, and against defendant Consolidation Coal Company in the amount of $172,112.65, consisting of $140,980.65 in back pay and $31,132 in front pay.

Therefore, on Count I, the Court finds in favor of plaintiff Sharon Snider and against the defendant Consolidation Coal

Company, and awards damages in the amount of $172,112.65, consisting of $140,980.65 in back pay and interest, and $31,132 in front pay, plus reasonable attorney's fees. The Court further finds on Count I in favor of defendant Richard C. Delloma and against plaintiff Sharon Snider. Richard C. Delloma shall take nothing on this Count.

In accordance with the jury verdicts on Counts II, III, IV, and V, the Court finds in favor of defendant Consolidation Coal Company and against plaintiff Sharon Snider. Consolidation Coal Company shall take nothing on these Counts.

In accordance with the jury verdicts on Counts III, IV, and V, the Court finds in favor of defendant Richard C. Delloma and against plaintiff Sharon Snider. Richard C. Delloma shall take nothing on these Counts.

The Clerk of the Court is directed to enter judgment accordingly.

Any additional affidavits and/or supplemental briefs with respect to the amount of attorney's fees shall be filed within ten (10) days of the date of this Order.

IT IS SO ORDERED.

DATED: 8 January 1991

/s/William D. Stiehl
DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

CASE NUMBER: 86-3462

SHARON SNIDER

V.

CONSOLIDATION COAL COMPANY and
RICHARD C. DELLOMA

JUDGMENT IN A CIVIL CASE

[Filed: Jan. 8, 1991]

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered on Count I in favor of the plaintiff, **SHARON SNIDER**, and against the defendant, **CONSOLIDATION COAL COMPANY**, in the amount of **$172,112.65**, consisting of $140,980.65 in back pay and interest, and $31,132.00 in front pay, plus reasonable attorney's fees. The Court further finds on Count I in favor of the defendant, **RICHARD C. DELLOMA** and against the plaintiff, **SHARON SNIDER**. Richard C. Delloma shall take nothing on this Count.

FURTHER, in accordance with the jury verdicts on Count II, III, IV and V, judgment is entered in favor of the defendant, **CONSOLIDATION COAL COMPANY** and against plaintiff, **SHARON SNIDER**. Consolidation Coal Company shall take nothing on these Counts.

FURTHER, in accordance with the jury verdicts on Counts III, IV and V, judgment is entered in favor of the defendant, **RICHARD C. DELLOMA** and against plaintiff, **SHARON SNIDER**. Richard C. Delloma shall take nothing on these Counts.

Date: January 8, 1991

Clerk, Stuart J. O'Hare

/s/Sandra Pannier
(By) Deputy Clerk

Supreme Court, U.S.
FILED
NOV 30 1992
OFFICE OF THE CLERK

No. 92-892

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CONSOLIDATION COAL COMPANY,
Petitioner,

vs.

SHARON SNIDER,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CITATION TO THE OPINION BELOW

The opinion of the three judge panel of the Seventh Circuit Court of Appeals, rendered on August 26, 1992, is reported at 973 F.2d 555 (7th Cir. 1992). The full Court of Appeals denied rehearing en banc on September 28, 1992. A copy of the panel's opinion is printed as Appendix A to petitioner's submission and therefore will not be reprinted herein by respondent.

STATEMENT OF THE CASE

The respondent, Sharon Snider, was a coal miner. She worked for the petitioner, Consolidation Coal Company, at one of its

surface mines in southern Illinois. Her experience there was not happy. On the contrary, it was tragic. She was the victim of severe and pervasive acts of sexual harassment, including coerced sexual intercourse and forced oral sex, committed by Richard Delloma, the Superintendent of the mine. As a result of the harassment, she tried to commit suicide, was emotionally disabled from working at the mine, and incurred substantial medical expenses and lost income.

Ms. Snider brought this lawsuit to try to remedy the wrong done to her. She asserted a Title VII claim under federal law against Delloma and the coal company and several tort claims under state law against the two defendants. The tort claims were tried to a jury and the Title VII claim was tried simultaneously to the Court. At trial, the key issue was credibility. Ms. Snider set forth her allegations and Delloma denied them. In an effort to discredit her, defendants pointed to the fact that Ms. Snider failed to lodge a contemporaneous complaint against Delloma. According to the defendants, Ms. Snider's failure to report Delloma's sexual misconduct meant that she was lying about it. Defendants returned to this important theme over and over again throughout the course of the trial.

To counter defendants' argument, Ms. Snider offered the expert testimony of Dr. Freada Klein, a consultant to employers who has surveyed literally hundreds of thousands of employees in the public and private sector concerning their experiences with sexual harassment. Among other things, Dr. Klein explained that only 5% or less of the victims of severe on-the-job sexual harassment actually take advantage of available complaint mechanisms. She explained that women do not report such harassment because of fear of reprisal and fear of loss of privacy. The trial judge refused to allow the jury to hear Dr. Klein's testimony. He did not believe it was admissible on the state tort claims. The trial judge did believe, however, that Dr. Klein's testimony was clearly admissible on the Title VII claim. Accordingly, he heard

her testimony, outside the presence of the jury, for purposes of the Title VII claim.

Apparently, the jury did not believe Ms. Snider's allegations of sexual harassment. At the conclusion of the trial, it returned verdicts against her on the state tort claims. The trial judge, however, did believe Ms. Snider's allegations of sexual harassment. He issued a written decision, relying heavily on Dr. Klein's testimony, ruling in favor of Ms. Snider on the Title VII claim and awarding her back pay and front pay. The coal company appealed.

On appeal, a panel of the Seventh Circuit Court of Appeals affirmed the judgment in favor of Ms. Snider on the Title VII claim. The Court rejected the defendant coal company's argument that the trial judge was bound, under the doctrine of collateral estoppel and the Seventh Amendment to the U.S. Constitution, to follow the jury's findings:

> In the case at bar, crucial evidence was allowed in the Title VII hearing that was not (and could not be) presented to the jury; namely, Dr. Klein's testimony. The jury's verdict turned on one single issue: whether the jurors believed Snider's version of the events, or whether they believed Delloma's. [One] of the key facts relied upon by the defendants' attorneys in attacking Snider's veracity was her failure to complain about Delloma's actions . . . Dr. Klein's testimony addressed this issue by making it clear that few victims of sexual harassment make a contemporaneous complaint, particularly if the harassment occurs in an occupation traditionally dominated by members of the opposite sex.... Because Dr. Klein's testimony was critical to an important issue in the case, but was excluded from the jury trial through no fault of the plaintiff, the district court did not improperly render a decision contrary to the findings of the jury.

See Petitioner's Appendix A at A7-A9. The Court's opinion, which was written by Judge Gibson and joined by Judge Manion and Chief Judge Bauer, was unanimous. The coal company filed a petition for rehearing en banc but it was unanimously denied by the full Court. Running out of options, the coal company filed a petition for a writ of certiorari with this Court seeking review of the Seventh Circuit's decision against it.

SUMMARY OF ARGUMENT

The general rule is that when common factual issues are tried to both a judge and a jury the jury's findings on the common factual issues are binding on the judge. But this rule, like most rules, has exceptions. The rule does not apply when important evidence is available to the judge which was not available to the jury. That is the situation here. The trial judge heard crucial evidence supporting respondent Snider's credibility — the testimony of her expert witness Dr. Freada Klein — which the jury did not hear. Consequently, the trial judge was free to reject the jury's findings against Ms. Snider and substitute his own findings in favor of Ms. Snider. Significantly, the petitioner coal company is unable to cite a single case in its petition for certiorari which holds that a judge must follow the jury's findings where, as here, the judge hears important admissible evidence which the jury did not hear. On the contrary, there are numerous cases which hold that the judge is not bound to follow the jury's findings under these special circumstances. The Seventh Circuit's decision in this case is correct on the merits and does not conflict with any decisions by other federal appellate courts. Accordingly, it does not warrant review by this Court.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

The petitioner coal company contends that the trial judge had to conform his findings on the Title VII claim to the jury's findings on the state tort claims. The coal company argued in the Court below that this result is mandated by (1) the common law doctrine of collateral estoppel and (2) the Seventh Amendment to the U.S. Constitution. The coal company is mistaken on both counts. Each will be discussed in turn.[1]

1. Collateral Estoppel

This Court has held that collateral estoppel will not bar relitigation of an issue when a second action affords a party "procedural opportunities unavailable in the first action that could readily cause a different result." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-331 (1979). The fact that new evidence can be introduced in the second action, which could not be introduced in the first action, will warrant denying issue preclusion on the ground of fairness if the new evidence is of the sort which might (not necessarily will) lead to a different result. *Jack Faucett Associates v. American Tel. & Tel.*, 744 F.2d 118, 126 (D.C. Cir. 1984); *Carr v. District of Columbia*, 646 F.2d 599, 606 n. 35 (D.C. Cir. 1980); *Butler v. Stover Bros. Trucking Co.*, 546 F.2d 544, 551 (7th Cir. 1977); *Technograph Printed Circuits, Ltd. v. United States*, 372 F.2d 969, 979 (Ct. Cl. 1967); *Restatement (Second) of Judgments* §29, comment j at p. 303 (1982).

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[1] In the Court below, the coal company relied heavily upon the common law doctrine of collateral estoppel. Indeed, it did not even mention the Seventh Amendment until it filed its reply brief in the case. In this Court, however, the coal company relies heavily upon the Seventh Amendment. In fact, it seems to disavow any reliance at all upon the common law doctrine of collateral estoppel. Ms. Snider will discuss both issues. A clear understanding of the doctrine of collateral estoppel will serve to put the coal company's Seventh Amendment argument in proper context.

At the heart of this case was a question of credibility: was Sharon Snider telling the truth about Richard Delloma? Since there were no witnesses to the sexual harassment, Ms. Snider's credibility was the critical issue of fact in the case. According to the coal company, this issue was adjudicated adversely to Ms. Snider by the jury hearing the state tort claims. It insists she was collaterally estopped from relitigating the same issue before the judge hearing the Title VII claim. But the coal company stubbornly refuses to come to grips with the fact that the trial judge heard crucial evidence supporting Ms. Snider's credibility which the jury did not hear. This was the testimony of Ms. Snider's expert witness Dr. Freada Klein. Dr. Klein's expert testimony was highly probative of Ms. Snider's credibility and could, and did, influence the judge to reach a different result from the jury.

At trial, the defendant coal company made much of the fact that Ms. Snider did not lodge a contemporaneous complaint against Delloma with any of her doctors, with her union, with her employer, with the police or with the Illinois Department of Human Rights. The company and its co-defendant, Delloma, never missed an opportunity to hammer away at this fact. They emphasized it in their opening statements (Tr. I at 41-43, 49) and in their closing statements (Tr. VII at 15, 17-22, 24, 27-29, 33-34, 39-40). And everywhere in between. They emphasized it in their cross-examination of Ms. Snider (Tr. II at 49-57, 71-72, 77, 84-86, 88, 139-143, 156-157, 163; Tr. VI at 57, 59-60) and in their cross-examination of Ms. Snider's witnesses (Tr. II at 202; Tr. IV at 44, 72, 81, 101). They emphasized it in their case in chief to the point of mindnumbing tedium (Tr. V at 14-15, 22, 25-26, 34-35, 49-51, 54-56, 61, 65, 136, 141, 173). They brought a parade of witnesses into court, six of them, whose sole or primary purpose in testifying was to establish that Ms. Snider knew she could complain of sexual harassment but nevertheless refused to do so (Tr. V at 12-92, 133-169). These company and union officials testified in elaborate detail concerning the post-

ers, seminars, retraining sessions, union meetings and other ways in which women at the mine, including Ms. Snider, were informed of their right to protest unlawful sexual harassment. As the coal company put it during closing argument, "witness after witness after witness" testified "ad nauseam" to these matters (Tr. VII at 15, 21). The extraordinary extent to which the defendants dwelled upon Ms. Snider's failure to complain testifies to its extraordinary importance in the case. It was *the* defense for the defendants. Their message to the jury and to the judge was clear and simple: Ms. Snider did not report Delloma because there was nothing to report. She was lying.

This line of attack seriously damaged Ms. Snider's credibility. Left unrebutted, it would have been fatal. As it was, Dr. Klein explained Ms. Snider's failure to complain and cast an entirely different light upon it. She repaired the damage done to Ms. Snider's credibility. She did this by explaining that the overwhelming majority of women do not report sexual harassment of the kind endured by Ms. Snider. In fact, only 5% or less of the women who are victims of severe on-the-job sexual harassment actually take advantage of available complaint mechanisms (Tr. III at 113-114). Significantly, this holds true in both union and non-union workforces (Tr. III at 115, 123-124). These are startling facts, ones which are scarcely known to the average juror or judge. Dr. Klein explained that major research studies conducted over the past ten years, including her own, show there are two basic reasons for the phenomenon.

First, is the victim's fear of reprisal (Tr. III at 115). In this case, Ms. Snider testified she was afraid to report Delloma for fear of jeopardizing her employment (Tr. II at 157). That is understandable, since her allegations were quite serious, and unless the company believed them and fired Delloma, she would always remain vulnerable to retaliation from him. Second, is the victim's fear of loss of privacy (Tr. III at 115). Many women are reluctant to register a formal complaint of severe sexual harass-

ment when it means recounting and repeating to others the vile and humiliating details of their experiences. In this case, Ms. Snider testified she did not tell any of her doctors about her experiences with Delloma because "I can't talk about things like that. I couldn't do that" (Tr. II at 180). When Delloma brought her back to her worksite after forcing her to perform oral sex on him, she did not tell her foreman what had just happened because "I was embarrassed. I was in shock" (Tr. I at 79). She did not file a rape report with the police because "I did not want it to be known what he had done to me" (Tr. II at 86). Dr. Klein's expert testimony served to reinforce and validate Ms. Snider's reasons for not reporting Delloma's sexual misconduct. More importantly, it served to inform the trier of fact that her failure to complain was not at all unusual and that it was, in fact, the norm among women who are sexually victimized by their bosses at work. It did *not* mean she was lying.

Significantly, the coal company did not object to Dr. Klein's testimony on this important point when it was introduced at trial as part of the Title VII case (Tr. 113-115). Moreover, as the Seventh Circuit pointed out, "Consol has not appealed the court's decision to admit Dr. Klein's testimony for purposes of the Title VII claim." *See* Petitioner's Appendix A at A4 n. 5. Thus, the coal company did not challenge Dr. Klein's testimony, at trial or on appeal, when it had the opportunity to do so. That is not surprising, since any challenge to the admissibility of Dr. Klein's testimony would have surely failed. Expert testimony is always admissible when used defensively to counter an attack on the credibility of a victim of sexual abuse. As one commentator has observed:

> When the expert is explaining that specific behavior, which the defense has suggested is unusual and demonstrates a lack of credibility, is in fact commonplace among those who have been victimized, the evidence is universally admitted.

See Mosteller, *Legal Doctrines Governing the Admissibility of Expert Testimony Concerning Social Framework Evidence*, 52 Law and Contemporary Problems 85, 119-120 (1989). This basic principle is firmly embedded in the caselaw. *See, e.g., U. S. v. Winters*, 729 F.2d 602, 605 (9th Cir. 1984) (expert testimony is admissible to explain why victims of forced prostitution would not "take advantage of opportunities to escape or call for help"); *People v. Hampton*, 746 P.2d 947, 951-952 (Colo. 1987) (expert testimony is admissible to explain that a "rape victim who is assaulted by somebody she knows rather than by a stranger is generally more reluctant to report the assault to police because of fear of retaliation"); *State v. Petrich*, 683 P.2d 173, 178, 180 (Wash. 1984) (expert testimony is admissible to explain the delayed reporting patterns of sexually abused children, including statistics showing "that delay in reporting is not unusual"); *Smith v. State*, 277 S.E.2d 678, 683 (Ga. 1981) (expert testimony is admissible to explain why a person suffering from the battered woman syndrome "would not leave her mate [and] would not inform police or friends").

According to the coal company, the Seventh Circuit ruled that the trial judge acted properly in barring Dr. Klein from testifying before the jury. This is fantasy. The Seventh Circuit made no such ruling. In any event, the relevant question is not whether Dr. Klein's expert testimony was properly before the jury on the state tort claims. Rather, the relevant question is whether Dr. Klein's expert testimony was properly before the judge on the Title VII claim. *See, e.g., Butler v. Stover Bros. Trucking Co.*, 546 F.2d 544, 549-551 (7th Cir. 1977) (collateral estoppel not applied because Dead Man Act, which barred crucial testimony in the first proceeding, did not bar the testimony in the second proceeding). As noted, the trial judge heard Dr. Klein's testimony, outside the presence of the jury, for purposes of the Title VII claim. Clearly, the Seventh Circuit was correct in ruling that Dr. Klein's testimony was properly admitted into evidence as part of the Title VII case. *See* Petitioner's Appendix A at A4 n.

5 and A8-A9. After all, the coal company failed to assert a timely objection to it.[2]

We need not speculate whether Dr. Klein's compelling testimony in this case could have influenced the judge to reach a different result from the jury. We know that it did. The trial judge relied heavily upon Dr. Klein's testimony in ruling in favor of Ms. Snider on her Title VII claim. Indeed, he made thirty specific factual findings, six of which were based exclusively on Dr. Klein's testimony. Significantly, he concluded that Ms. Snider was telling the truth about Delloma despite her failure to register a contemporaneous formal complaint against him. He expressly rejected the coal company's argument that her delay in reporting Delloma's conduct meant that it did not occur or that it was welcomed:

> Plaintiff's reluctance to file a formal complaint against Delloma is consistent with the patterns exhibited by subordinate employees who are subjected to sexual harassment by their supervisors. The Court finds that although plaintiff did not file a union grievance or a formal EEOC complaint, the attention by Delloma was unwelcome and constituted sexual harassment.

See Petitioner's Appendix C at A24. Given the importance of Dr. Klein's testimony, and the fact that the jury did not hear it, the trial judge did not err in refusing to follow the jury's findings. The trial judge was free, under a well-recognized exception to-

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[2]The coal company's reliance on *O'Reilly v. Malon*, 747 F.2d 820 (1st Cir. 1984), is completely misplaced. In that case, the plaintiff argued that collateral estoppel should not be applied because certain evidence was improperly excluded by the trial judge. In a footnote, the First Circuit rejected this argument, pointing out that it had already ruled in a prior appeal that the trial judge acted properly in excluding the evidence. *Id.* at 823 n. 3. In the present case, by contrast, the Seventh Circuit did not rule that Dr. Klein's expert testimony was inadmissible. On the contrary, it correctly ruled it was admissible.

the doctrine of collateral estoppel, to make his own findings which differed from those of the jury.

2. The Seventh Amendment

The petitioner coal company contends that the Seventh Amendment right to trial by jury means that a trial judge hearing an equitable Title VII claim must follow the jury's factual findings on concurrently tried legal tort claims. This is unquestionably wrong. The Seventh Amendment guarantees the right to trial by jury on legal, not equitable, claims. *Local No. 391 v. Terry*, 110 S.Ct. 1339, 1344-1345 (1990). The coal company got its jury trial on the legal tort claims in this case. That is all the Seventh Amendment required. Courts have held that there is no constitutional right to trial by jury on an equitable Title VII claim. *See, e.g., Lincoln v. Board of Regents of Univ. System*, 697 F.2d 928, 934 (11th Cir. 1983). The coal company cannot seriously contend that the jury's findings on the legal tort claims, to which the Seventh Amendment applies, must carry over and bind the judge on the equitable Title VII claim, to which the Seventh Amendment does not apply. Taken seriously, such a contention would confer on the coal company a constitutional right to trial by jury on an equitable Title VII claim which the courts have held does not exist.

Judge Posner threw cold water on the coal company's constitutional argument in *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990). In that case, the employee joined a legal claim under 42 U.S.C. §1981, triable to the jury, with an equitable claim under Title VII, triable to the court. Judge Posner, writing for the Court, explained that the trial judge could reject the jury's findings and substitute his own findings without violating the Seventh Amendment:

> And there would be no logical inconsistency in the judge's refusing to set aside the jury's verdict because he could not say that it was unreasonable, while disagreeing with the verdict and therefore entering a contrary judgment on

> parallel claims not triable to a jury. What is true is that the judge's findings of fact could not foreclose the jury in its domain, *Lytle v. Household Mfg., Inc.*, 110 S.Ct. 1331, 1335-37 (1990), because this would impair the parties' rights under the Seventh Amendment. ***But that is not a danger when the question is whether the jury's findings should have preclusive effect on claims to which the Seventh Amendment does not apply.***

908 F.2d at 113 (emphasis added). As usual, Judge Posner's reasoning is concise, accurate and unanswerable. It has been echoed by at least two other federal circuit courts. *Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1529 n. 4 (11th Cir. 1990); *Wallace Motor Sales v. American Motors Sales Corp.*, 780 F.2d 1049, 1063-1067 (1st Cir. 1985). Without doubt, the coal company's constitutional argument based on the Seventh Amendment is without merit. Accordingly, it is not worthy of review by this Court.[3]

The coal company's constitutional argument would fail in the particular circumstances of this case even assuming, for the sake of argument, that there exists a general rule, rooted in the Seventh Amendment, which binds the judge to the jury's findings. Any such general rule would have to recognize an exception for cases where, as here, crucial evidence can be presented to the judge which could not be presented to the jury. As discussed, the common law doctrine of collateral estoppel, which ordinarily

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[3] The coal company seems to think that this Court's decision in *Lytle v. Household Mfg., Inc.*, 110 S.Ct. 1331 (1990) is somehow relevant to the present case. It is not. *Lytle* stands for the unremarkable proposition that "[w]hen legal and equitable claims are joined in the same action, the right to jury trial on the *legal* claim, including all issues common to both claims, remains intact." *Id.* at 1335 (emphasis added). As noted, the coal company got its jury trial on the legal claims in this case. So everything that *Lytle* requires was provided to the coal company. *See Wise v. Dallas & Mavis Forwarding Co.*, 751 F.Supp. 90, 92-93 (W.D.N.C. 1990).

binds the judge to the jury's findings, recognizes such an exception. It stands to reason the Seventh Amendment would recognize the same exception. Indeed, the coal company admitted as much at oral argument in the Court below. As the Seventh Circuit pointed out, the coal company "conceded the analysis would be the same whether we analyzed this case under the Seventh Amendment or collateral estoppel." *See* Petitioner's Appendix A at A6-A7.[4]

CONCLUSION

Petitioner has failed to demonstrate the existence of any special or important reasons why a writ of certiorari should be granted in this case. Accordingly, the writ should be denied.

Respectfully submitted,

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[4]The coal company suggests that the jury verdicts against Ms. Snider must be given preclusive effect because Ms. Snider did not ask the Seventh Circuit to set them aside. This Court has recognized, however, that there are a multitude of reasons for refusing to give preclusive effect to a prior judgment which do not require that the prior judgment must first be set aside. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330-331 and n. 15 (1979). This case presents one of them. As noted, courts will refuse to give preclusive effect to a jury verdict rendered in a prior action when material evidence can be introduced in the second action which could not be introduced in the prior action. Significantly, this is true even if the jury verdict in the prior action has not been set aside as invalid. *See, e.g., Jack Faucett Associates, supra*, 744 F.2d at 127-129; *Butler, supra*, 546 F.2d at 548-552.